

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of HORACE J. WILLIAMS and DEPARTMENT OF THE NAVY,
PUBLIC WORKS CENTER, Oakland, CA

*Docket No. 99-2301; Submitted on the Record;
Issued March 22, 2001*

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that an overpayment of \$9,289.01 was created; and (2) whether the Office properly found appellant to be at fault in creating the overpayment.

In this case, the Office accepted that appellant sustained a right shoulder strain in the performance of duty on November 9, 1989, with a right shoulder strain and arm overuse syndrome causally related to factors of his federal employment. Appellant stopped working on April 25, 1997 due to a reduction-in-force; he received severance pay from April 26 to August 18, 1997. On August 22, 1997 the Office issued a compensation payment for \$16,026.80, covering the period February 6 to August 22, 1997.

In a letter dated July 22, 1998, the Office advised appellant that a preliminary determination had been made that an overpayment of \$9,289.01 was created. The Office stated that, during the period April 26 to August 18, 1997, he had received both compensation and severance pay. With respect to fault, the Office made a preliminary finding that appellant was at fault, since he should have known compensation payments and severance pay were not payable for the same period. Appellant was advised that a claimant at fault in creating an overpayment is not entitled to waiver of the overpayment.

By decision dated June 8, 1999, the Office finalized the overpayment amount and the finding of fault

The Board finds that an overpayment of \$9,289.01 was created.

The Board has held that the Office may properly find that an overpayment has occurred when a claimant receives both compensation and severance pay during the same period.¹ The

¹ See *Bonnye Matthews*, 45 ECAB 657 (1994).

record indicates that from April 26 to August 18, 1997 he did receive severance pay, and on August 22, 1997 the Office issued a compensation payment that covered the same period. The Office determined that, during the period April 26 to August 18, 1997, appellant was paid \$9,635.33 in compensation. The overpayment amount was calculated after deducting health benefits and life insurance premiums.

On the issue of fault, the Board finds that the Office did not properly determine that appellant was at fault in creating the overpayment.

Section 8129(b) of the Federal Employees' Compensation Act² provides: "Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of the Act or would be against equity and good conscience."³ No waiver of an overpayment is possible if the claimant is at fault in creating the overpayment.⁴

On the issue of fault, 20 C.F.R. § 10.433 provides that a claimant who has done any of the following will be found at fault in creating an overpayment: (1) made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or (2) failed to provide information which he or she knew or should have known to be material; or (3) accepted a payment which he or she knew or should have known to be incorrect.

The Office bears the burden of proof in showing that a claimant is with fault in the matter of an overpayment of compensation.⁵ In this case, the Office apparently based its finding of fault on the grounds that appellant accepted an August 1997 payment that he knew or should have known was incorrect. The Office determined that appellant knew or should have known he could not receive compensation and severance pay during the same period. The record does not, however, contain sufficient evidence to support this conclusion. There is no evidence of record that appellant did in fact know that the August 22, 1997 payment was incorrect. With respect to the "should have" known standard, the Office did not identify any specific evidence that is sufficient to establish that appellant should have known the compensation payment was incorrect. The record does not contain any correspondence or other probative evidence that notified appellant that compensation could not be received during a period that severance pay was received.⁶

In the absence of probative evidence establishing that appellant knew or should have known that the August 22, 1997 compensation payment was incorrect, the Board finds that the

² 5 U.S.C. §§ 8101-8193.

³ 5 U.S.C. § 8129(b).

⁴ *Gregg B. Manston*, 45 ECAB 344 (1994).

⁵ *Danny L. Paul*, 46 ECAB 282 (1994).

⁶ *Cf. Bonnye Matthews*, *supra* note 1, where the employing establishment had notified appellant by letter that she could not receive severance pay and compensation for the same period.

Office has not properly established that appellant was at fault in creating the overpayment in this case.

The decision of the Office of Workers' Compensation Programs dated June 8, 1999 is affirmed with respect to fact of and amount of the overpayment, and set aside with respect to fault. The case is remanded for consideration of waiver of the overpayment.

Dated, Washington, DC
March 22, 2001

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member